

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

DIRECTV, INC.,)	
)	
Plaintiff,)	Case No. 1:03CV00151
)	
v.)	OPINION AND ORDER
)	
TERRY MULLINS, ET AL.,)	By: James P. Jones
)	Chief United States District Judge
Defendants.)	

*Adam Casagrande, Williams Mullen, Virginia Beach, Virginia, for Plaintiff;
Joshua P. Sutherland, III, Sutherland Law Firm, PLC, Abingdon, Virginia, for
Defendant Paul Skeens.*

The defendant Paul Skeens has moved to quash service of process in this civil case. The parties have submitted affidavits and briefed the issues, and the motion is ripe for decision.¹

The action was instituted on November 26, 2003. The return of service of the summons and complaint recites that service was made by Melissa A. Ross, a private process server, on December 23, 2003, at 10069 Trading Post Lane, Bristol, Virginia.

¹ Neither party has requested a hearing on the motion, although the court required any such request to be made promptly following the submission of materials relating to the motion. I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

The process server made oath on the return as follows: “Being unable to make personal service, a copy was delivered in the following manner: Delivered to family member (not temporary sojourner or guest) age 16 or older of party named above after giving information of its purport.”

In support of his motion, the defendant Skeens has filed an affidavit stating that he does not reside at 10069 Trading Post Lane, Bristol, Virginia, and has never resided there; that his daughter and son-in-law live at that address; that he resides in Russell County, Virginia; and that he has never authorized any person to accept service on his behalf. He has also filed an affidavit of Cecil Joe Holbrook, Jr., the son-in-law of Skeens, who stated that the process server came to his home at 10069 Trading Post Lane and asked for Skeens. Although Holbrook told her that Skeens lived in Russell County, the process server said she would leave the documents with Holbrook “if [he] would give them to Mr. Skeens.”

On the other hand, the plaintiff has filed a facsimile copy of an affidavit of Ross, the process server, who states that Holbrook told her on December 23 that “although Mr. Skeens was not present at the time, Mr. Skeens does reside at and receive[s] his mail at that address.”

Rule 4 of the Federal Rules of Civil Procedure governs the service of process in this case. It provides that service on an individual may be effected (1) pursuant to

state law or (2) “by delivering a copy of the summons and complaint to the individual personally or by leaving copies thereof at the individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein” Fed. R. Civ. P. 4(e).

State law provides similarly that process may be served by delivering a copy to the party in person or, “[i]f the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of sixteen years or older.” Va. Code Ann. § 8.01-296(2)(a) (Michie 2000). This provision of law means that substituted service must be to a family member at the party’s usual place of abode. *Crockett v. Etter*, 54 S.E. 864, 865 (Va. 1906).

On its face, the return of service does not show that service was made at the defendant’s dwelling house or usual place of abode. Thus, any presumption of correctness as to the return, *see Johnson v. United Steelworkers of Am.*, 172 F.R.D. 185, 187 (W.D. Va. 1997), does not apply. While I might allow an amendment of the return in accord with the affidavit of the process server, the plaintiff would still have the burden of showing proper service. *See Saez Rivera v. Nissan Mfg. Co.*, 788 F.2d

819, 821 n.2 (1st Cir. 1986). In light of the conflicting affidavits, I cannot find that the plaintiff has met its burden. Accordingly, I will quash service of process.

This does not end the case. In light of the plaintiff's reliance on the facts set forth in the process server's affidavit, good cause exists for an extension of time for the plaintiff to attempt service. Fed. R. Civ. P. 4(m); *see Johnson*, 172 F.R.D. at 188 (finding good cause for extension where plaintiff reasonably believed service was proper). I will grant the plaintiff additional time to obtain proper service.

For the foregoing reasons, it is **ORDERED** that service of the summons and complaint of the defendant Paul Skeens is quashed. It is further **ORDERED** that pursuant to Federal Rule of Civil Procedure 4(m), the plaintiff is granted 60 days from the date of entry of this Order to effect service.

ENTER: May 14, 2004

/s/ JAMES P. JONES
Chief United States District Judge